(2)

No. 02-1387

Supreme Court, U.S.
FILED
APR 21 2003
OFFICE OF THE CLERK

In The

Supreme Court of the United States

ROBERT C. WAITERS, SR., et al.,

Petitioners,

v.

PRINCE GEORGE'S COUNTY, MARYLAND, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JAY H. CREECH
14741 Governor Oden Bowie Drive,
Suite 5121
Upper Marlboro, Maryland 20772
(301) 952-5239
Counsel of Record for Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

19 pp

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

I. STATEMENT OF THE CASE 1

II. ARGUMENT 2

A. This Case Does Not Meet The Criteria For Review By This Court 2

B. There Is Not A Conflict Between The Circuits On The Scope Of Conduct To Be Reviewed 3

C. The Court Did Not Improperly Apply The Facts 7

III. CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES

Abraham v. Raso, 183 F.3d 279 (3rd Cir. 1999)..... 6

Allen v. Muskogee, 119 F.3d 837 (10th Cir. 1997), *cert. denied*, 522 U.S. 1148, 118 S.Ct 1165 (1998)..... 6

Billington v. Smith, 292 F.3d 1177 (9th Cir. 2002).....5, 6

Brandenburg v. Cureton, 882 F.2d 211 (6th Cir. 1989)..... 6

Carter v. Buscher, 973 F.2d 1328 (7th Cir. 1992) 5

Deering v. Reich, 183 F.3d 645 (7th Cir.), *cert. denied*, 528 U.S. 1021, 120 S.Ct 532 (1999) 6

Fraire v. City of Arlington, 957 F.2d 1268 (5th Cir.), *cert. denied*, 506 U.S. 973, 113 S.Ct 462 (1992)..... 5

Gilmere v. City of Atlanta, 774 F.2d 1495 (11th Cir. 1985) (*en banc*), *cert. denied*, 476 U.S. 1115, 106 S.Ct 1970 (1986).....5, 6

Graham v. Connor, 490 U.S. 386, 109 S.Ct 1865 (1989).....3, 4, 5, 9

Greenidge v. Ruffin, 927 F.2d 789 (4th Cir. 1991).....4, 6, 7

Napier v. Town of Windham, 187 F.3d 177 (1st Cir. 1999).....5, 6

Salim v. Proulx, 93 F.3d 86 (2nd Cir. 1996)..... 5

Saucier v. Katz, 533 U.S. 194, 121 S.Ct 2151 (2001)..... 8

Schulz v. Long, 44 F.3d 643 (8th Cir. 1995)..... 5

Scott v. Henrich, 39 F.3d 912 (9th Cir. 1994), *cert. denied*, 515 U.S. 1159, 115 S.Ct 2612 (1995).....6, 7

TABLE OF AUTHORITIES – Continued

Page

St. Hilaire v. City of Laconia, 71 F.3d 20 (1st Cir. 1995), *cert. denied*, 518 U.S. 1017, 116 S.Ct 2548 (1996) 6

Wilson v. Meeks, 52 F.3d 1547 (10th Cir. 1995) 5

RULES

Rules of the Supreme Court of the United States, Rule 10 2

Rules of the Supreme Court of the United States, Rule 14(1)(g) 1

I. STATEMENT OF THE CASE

The Respondents would object to the Petitioners' statement of the case as provided since it is not "[a] concise statement . . . setting out the facts material to consideration of the questions presented" as required by Rule 14(1)(g) of the rules of this Court but was taken by Petitioners as an additional opportunity to provide argument. To those facts contained in the statement, the Respondents would supplement as follows:

Corporal Robert Hettenhouser and Officer Corey Joyner responded to a call for unknown trouble at the Waiters' residence. JA 128, 173 & 392. They observed blood on the doors of the apartment building and the apartment. JA 116, 132-133 & 178. The officers found two men struggling in the living room of the apartment. JA 70, 134-135 & 179. They identified themselves as police officers and gave orders to stop fighting. One of the men complied with these orders and the other darted into the kitchen. JA 70, 136 & 181.

The officers followed Dwayne Waiters into the kitchen, which is relatively small. The distance between them and the suspect is approximately six feet. JA 143, 182 & 184. Dwayne Waiters ignored the officers as they attempted to quiet the situation and was exhibiting bizarre behavior. JA 144-145 & 308-309. Robert Waiters was unable to hear the officers' commands to his son, Dwayne, because he was shouting at the same time. JA 71. Dwayne Waiters was next to a knife that one of the officers described as "a kitchen knife and six to eight inches long." JA 313. The other officer stated that it was a knife having a "blue handle with a shiney [sic] blade 6 inches." JA 324. The

suspect reached for the knife and lunged toward the officers. JA 144 & 185.

Dr. Adams, Petitioners' forensic pathologist, testified that the wounds which he believed to be the first two wounds inflicted were consistent with the officers' testimony that the decedent "slipped off of the counter and turned towards a knife, and they began to shoot . . . " JA 352, 356. The doctor later testified that his data and analysis indicate that the way the officers said the incident unfolded is the way it happened. JA 357.

Mr. Klotz, Petitioners' use of force expert, agreed that if an officer is within 15 feet of a person with an edged weapon (such as a knife), the suspect is able to stab the officer before the officer can shoot and disable the suspect. JA 270. In addition, Mr. Klotz agreed that an officer who is within six (6) to eight (8) feet of a suspect who appears to be going for a knife and lunging towards him is justified in using deadly force. JA 264.

II. ARGUMENT

A. This Case Does Not Meet The Criteria For Review By This Court

The United States Supreme Court has discretion to grant a writ of certiorari when it concludes that "compelling reasons" exist to warrant review. Rules of the Supreme Court of the United States, Rule 10. The Petitioner essentially contends that this case falls within the reasons enumerated in subsection (a) which states that:

> a United States court of appeals has entered a decision in conflict with the decision of another

> United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power . . .

The rule further notes that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

B. There Is Not A Conflict Between The Circuits On The Scope Of Conduct To Be Reviewed.

This Court held in *Graham v. Connor*, 490 U.S. 386, 109 S.Ct 1865 (1989), "that *all* claims that law enforcement officers have used excessive force – deadly or not – in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard . . . " *Id.* at 395, 109 S.Ct at 1871 (emphasis in original). Under that reasonableness standard, the Court instructed that one must pay

> careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight . . . The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the

> 20/20 vision of hindsight . . . The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation.

Id. at 396-97, 109 S.Ct at 1872. The Petitioners assert that there is a conflict between the Circuits on the extent to which pre-confrontation conduct of the officer bears upon the objective reasonableness of his actions.

In *Greenidge v. Ruffin*, 927 F.2d 789 (4th Cir. 1991), the Fourth Circuit stated that " . . . the Fourth Amendment 'objective reasonableness' standard [was considered] by requiring that the officer's 'liability be determined *exclusively* upon an examination and weighing of the information [the officer] possessed *immediately prior to and at the very moment [they] fired the fatal shot*[s].'" *Id.* at 792 (emphasis in original). It explicitly based this holding upon the *Graham* case and noted that in judging reasonableness this Court cautioned against the 20/20 vision of hindsight, "elaborated that 'reasonableness' meant the 'standard of reasonableness *at the moment,*'" and that consideration must be given to the officer because of the necessity that he make split-second judgments. *Id.* at 791-92 (emphasis in original). In that case, the Court sustained the trial court's ruling excluding evidence of the officer's actions immediately prior to the shooting (failing

to obtain proper backup and not utilizing a flashlight) as being irrelevant to the *Graham* standard.[1]

There is a second line of cases, misconstrued by the Petitioners, which conclude an officer's pre-confrontational conduct amounting to an independent constitutional violation or provoking an assault by the subject that results in the use of force is admissible. *See Napier v. Town of Windham*, 187 F.3d 177, 189 (1st Cir. 1999) ("pre-confrontational actions themselves could theoretically serve as the unreasonable conduct on which a §1983 claim is based"); *Billington v. Smith*, 292 F.3d 1177, 1191 (9th Cir. 2002) (" . . . Hennessey's estate has not established that Detective Smith provoked Hennessey's attack, much less committed an independent Fourth Amendment violation that provoked it."). Although decided on substantive due process grounds, the Court in *Gilmere v. City of Atlanta*, 774 F.2d 1495 (11th Cir. 1985) (*en banc*), *cert. denied*, 476 U.S. 1115, 106 S.Ct 1970 (1986), relied upon the conduct of the officer in provoking the suspect's retaliation. In doing so it stated that "any fear on the officer's part was the fear of retaliation

---

[1] Using similar treatment, the following Circuits have declined to second guess the pre-confrontational conduct of an officer and excluded or determined not to consider such evidence: *Salim v. Proulx*, 93 F.3d 86, 92 (2nd Cir. 1996) (failing to carry a radio, obtain backup or retreat because of children present); *Fraire v. City of Arlington*, 957 F.2d 1268, 1275 (5th Cir.), *cert. denied*, 506 U.S. 973, 113 S.Ct 462 (1992) (failure of the officer to display badge and identify himself while in plain clothes); *Carter v. Buscher*, 973 F.2d 1328, 1332 (7th Cir. 1992) (decision to arrest suspect on dark highway instead of elsewhere); *Schulz v. Long*, 44 F.3d 643, 649 (8th Cir. 1995) (the officer created the situation by poor tactical decisions); *Wilson v. Meeks*, 52 F.3d 1547, 1554 (10th Cir. 1995) (failure of officer to provide warning and order suspect to show his hands – one of which contained a weapon).

against his own unjustified physical abuse. We conclude that a moment of legitimate fear should not preclude liability for a harm which largely resulted from his own improper use of his official power." *Id.* at 1501. *Accord Allen v. Muskogee*, 119 F.3d 837, 841 (10th Cir. 1997), *cert. denied*, 522 U.S. 1148, 118 S.Ct 1165 (1998) (where an officer runs screaming to the vehicle of a known mentally impaired suspect). Facing such inquiry, the results are not substantially different than those obtained under the *Greenidge* analysis.[2]

The other cases cited by the Peititioners are factually inapposite to this analysis. In *Abraham v. Raso*, 183 F.3d 279, 293 (3rd Cir. 1999), the Court determined that there was a material dispute as to whether the officer was indeed in danger. The Court in *Deering v. Reich*, 183 F.3d 645, 650 (7th Cir.), *cert. denied*, 528 U.S. 1021, 120 S.Ct 532 (1999), considered "knowledge, facts and circumstances known to the officer at the time he exercised his split-second judgment" and specifically "[w]hat Deputy Reich knew about Deering and the basis for the warrant."

---

[2] The following conduct was not constitutionally significant to be considered by these Circuits under the reasonableness analysis: *Napier v. Town of Windham*, 187 F.3d at 188-89 (failure to "call ahead" or contacting the suspect from a position of cover); *St. Hilaire v. City of Laconia*, 71 F.3d 20, 27 (1st Cir. 1995), *cert. denied*, 518 U.S. 1017, 116 S.Ct 2548 (1996) (failure to knock and identify on search warrant); *Brandenburg v. Cureton*, 882 F.2d 211, 214 (6th Cir. 1989) (lack of tactical planning and loading of weapons before serving a warrant); *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994), *cert. denied*, 515 U.S. 1159, 115 S.Ct 2612 (1995) (failure to develop a tactical plan and call for assistance prior to attempting an apprehension); *Billington v. Smith*, 292 F.3d at 1190 (tactical errors such as initiating traffic stop in plain clothes, not waiting for backup, etc.).

The *Greenidge* Court never suggested that the knowledge of the officer be ignored, only the pre-confrontational conduct.

This suggests that the approach to pre-confrontational conduct and its relationship to the reasonableness inquiry between the Circuits is not as divergent as suggested by the Petitioners. There was no suggestion in the *Greenidge* case, nor those analyzed using that approach, that the pre-confrontational conduct amounted to a separate constitutional violation or provoked the suspect's actions should not be considered. These issues were never raised in the specific cases. It is, therefore, hard to project that a conflict exists when the ultimate rulings of these Circuits, i.e. the conclusion not to second guess tactical errors by an officer, are consistent.

C. The Court Did Not Improperly Apply The Facts.

The Petitioners also contend that a second conflict exists between the Circuits concerning the degree of scrutiny that should be accorded police shootings. This contention is derived from the language of *Scott* wherein the Court states that in such cases "[t]he judge must carefully examine all the evidence in the record, such as medical reports, contemporaneous statements by the officer and the available physical evidence, as well as any expert testimony proffered by the plaintiff, to determine whether the officer's story is internally consistent and consistent with other known facts." *Scott v. Henrich*, 39 F.3d at 915. There is nothing in the *Scott* case or elsewhere to suggest that this is a heightened standard of scrutiny but only an instruction to carefully consider all the evidence in

such cases. Apparently it is Petitioners' assertion that the nature and quality of evidence was not properly considered in the instant case.

The argument presented is that the Fourth Circuit made erroneous application of the facts and in doing so "has so far departed from the accepted and usual course of judicial proceedings" that this Court should grant certiorari. The Fourth Circuit decision is not in conflict with either the decision of another United States court of appeals or a decision by a state court of last resort, indeed, the law on the issue of constitutional violations is clear. However, as noted by the Court in *Saucier v. Katz*, 533 U.S. 194, 205-06, 121 S.Ct 2151, 2158 (2001) "*Graham* does not always give a clear answer as to whether a particular application of force will be deemed excessive by the courts. This is the nature of a test which must accommodate limitless factual circumstances." The Petitioner merely disagrees with the Fourth Circuit's application of the facts in this specific case to that test.

In the instant case, two police officers responded to a call for unknown trouble and encountered two doors smeared with blood as they entered the residence. Of the two individuals they found struggling inside, one obeyed their commands and the other retreated into the kitchen. Not knowing who else or what was in the kitchen, they followed Dwayne Waiters to determine his intent and because he was acting violently and failed to obey their commands.

In the close confines of the kitchen, these officers observe this individual acting in a bizarre fashion in close proximity to a knife. When Dwayne Waiters reached for the knife and lunged towards the officers, both Cpl.

Hettenhouser and Officer Joyner determined a threat existed and elected to use deadly force.

Petitioners assert that the officers made a tactical mistake and shouldn't have followed this individual into the kitchen or, because one officer observed Dwayne Waiters touch the knife while the other only testified he reached for it, there is a credibility issue that should require a trial. These types of assertions are precisely the second guessing and hindsight that the Court cautioned against in *Graham*. To second guess the officers' entry into the kitchen would inherently expose them to liability if they had decided not to pursue and this inaction permitted Dwayne Waiters to injure himself or another while in that room. Further, there is no doubt that these officers were only a few feet from an individual who had displayed violent, bizarre behavior, refused to comply with their commands and was now attempting to gain a weapon and move rapidly towards their position. Their reaction was reasonable and consistent with all authorities that discuss the use of deadly force.

III. CONCLUSION

For the reasons set forth above, the Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

JAY H. CREECH
14741 Governor Oden Bowie Drive,
Suite 5121
Upper Marlboro, Maryland 20772
(301) 952-5239
Counsel for Respondents

April 21, 2003